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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NORMAN F. SCHMITT, IN HIS OWN RIGHT AND AS AGENT AND REPRESENTATIVE OF R. W. BAIRD, JR., ET AL. ..... *Petitioners*

v. No. 321

WAR EMERGENCY PIPELINES, INC., AND RECONSTRUCTION FINANCE CORPORATION ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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October 19, 1949

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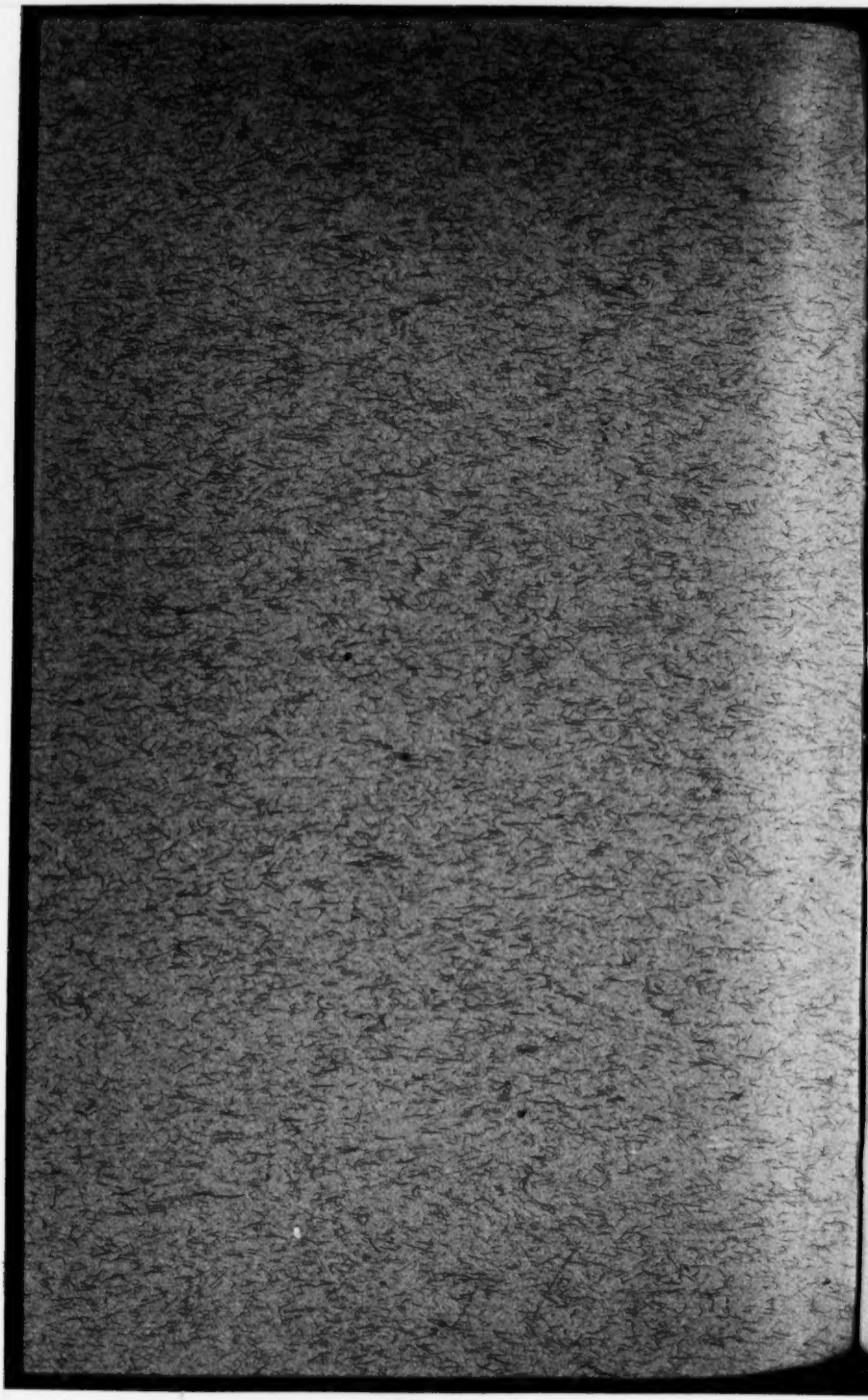

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WEP Was Not a Pipeline Company Within the Meaning of the Interstate Commerce Act

It is undisputed that WEP was not a common carrier. Unless it was a "*pipeline company*" within the meaning of the Interstate Commerce Act, it was not amenable to that Act, and petitioners are entitled to recover.

Respondents have not answered petitioners' argument that, in the absence of a statutory definition of the term "pipeline company", it devolves upon the courts to probe the concern in question and ascertain whether it was, *in fact*, a pipeline company. They have advanced no argument in opposition to petitioners' contention that an empty shell of a concern such as WEP, which owned nothing and did not even exist for profit, should not be held to be a pipeline company.

Instead, respondents have fallen back upon the definition of "transportation" (p.6) in an effort to show that WEP was a "pipeline company." But the two terms are not interchangeable and are not to be confused. In order for a given pipeline concern, which is not a common carrier, to be subject to the Interstate Commerce Act, it must have two attributes: (1) It must be, *in fact*, a "pipeline company" and (2) it must be engaged in the interstate transportation of oil by pipeline. A concern may very well be engaged in "transportation" without being, in fact, a pipeline company.

In our original brief (pp. 17-18), we pointed out that this Court, in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, refused to extend to the term "common carrier" the statutory definition of "transportation". It held that the owners and builders of refrigerator cars which had been leased to railroads or to shippers must, in order to be subject to the jurisdiction of the Interstate Commerce Commission, be common carriers *in fact*, and that they could not be "regarded as carriers, contrary to the truth" (237 U. S. 443). Petitioners urge that the *Ellis* decision is controlling here, that the question whether WEP was a pipeline company depends

upon whether it was such a company *in fact*, and that it cannot be regarded as such a company "*contrary to the truth*".

Respondents rely upon *United States* v. *Baltimore & Ohio Railroad Company*, 333 U. S. 169, 176 (p. 6). There, the question was whether the Interstate Commerce Commission had authority to prohibit the Baltimore & Ohio and other railroads from refusing to deliver interstate shipments of livestock to sidetracks which the railroads used but did not own. In holding that the Commission was so authorized, this Court pointed out that the Act makes "all trackage '*in use by any common carrier*' subject to the regulatory provisions of the Act, *even though not owned by the carrier, but only used by it under a contract or agreement*" (Italics supplied). Clearly that decision was bottomed upon the fact that the Act, by its very terms, subjected the trackage "*in use by any common carrier*" to the regulatory provisions of the Act, regardless of the question of ownership. That case has no bearing on the issue now before the Court. Here WEP was *not* a common carrier; and the Interstate Commerce Act nowhere provides that ownership of facilities shall be of no consequence in determining whether a concern is a "pipeline company" or that it is sufficient, for the purposes of determining whether a concern is amenable to the Act, that a concern merely *uses* a pipeline.

CONCLUSION

The question is whether WEP was a pipeline company, not whether it was engaged in transportation. The statutory definition of transportation is no guide in determining whether WEP was a pipeline company. Unless it was such a company *in fact*, it was not subject to the Interstate Commerce Act. All the facts surrounding its organization and the manner in which it functioned, together with the significant circumstance that the Interstate Commerce Commission never sought to regulate any of its activities, show that it was not a pipeline company and that it was, therefore, not subject to the Act.

Since WEP was not subject to the Act, petitioners, who were its employees, are not exempted from the Fair Labor Standards Act. The petition should, therefore, be granted and the judgment should be reversed.

Respectfully submitted,

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